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17

18 UNITED STATES DISTRICT COURT

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20 NORTHERN DISTRICT OF CALIFORNIA

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22 SAN FRANCISCO DIVISION

23

24 ETOPIA EVANS, *et al.*,

25

26 Plaintiffs,

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28 v.

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30 ARIZONA CARDINALS FOOTBALL
31 CLUB, LLC, *et al.*,

32

33 Defendants.

34

35 Civil Case No.: 3:16-CV-01030-WHA

36 **DEFENDANTS' NOTICE OF MOTION
37 AND MOTION FOR SUMMARY
38 JUDGMENT ON WORKERS'
39 COMPENSATION EXCLUSIVITY**

40 Date: July 13, 2017

41 Time: 8:00 a.m.

42 Dept: Courtroom 8

43 Judge: Honorable William Alsup

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1 NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**2 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on July 13, 2017, at 8:00 a.m., or as soon thereafter as
 4 available, in the courtroom of the Honorable William Alsup, located at 450 Golden Gate Avenue,
 5 Courtroom 8, 19th Floor, San Francisco, California 94102, defendants Chargers Football Company,
 6 LLC (“Chargers”), PDB Sports, Ltd. (“Broncos”), and Green Bay Packers, Inc. (“Packers”) will
 7 and hereby do move for summary judgment pursuant to Federal Rule of Civil Procedure 56
 8 because plaintiffs’ claims are precluded by workers’ compensation exclusivity.

9 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of
 10 Points and Authorities, the accompanying Declaration of Daniel Nash and exhibits, the pleadings
 11 and papers on file in this action, any other such matters upon which the Court may take judicial
 12 notice, the arguments of counsel, and any other matter that the Court may properly consider.

13 MEMORANDUM OF POINTS AND AUTHORITIES**14 INTRODUCTION**

15 The only remaining claims are Reggie Walker’s intentional misrepresentation claim against
 16 the Chargers and Alphonso Carreker’s intentional misrepresentation claims against the Broncos and
 17 Packers. *See* Dkt. No. 224 at 14. These claims are barred by the workers’ compensation laws of
 18 California, Colorado, and Wisconsin, where Walker and Carreker practiced and played for the
 19 Chargers, Broncos, and Packers, respectively. Each state’s law expressly provides that, with
 20 narrow exceptions not relevant here, workers’ compensation is the exclusive remedy for employees
 21 seeking to recover for injuries incurred during the course and scope of their employment. *See* CAL.
 22 LAB. CODE § 3602; COLO. REV. STAT. §§ 8-41-102, -104; WIS. STAT. §102.03(2). And, to reinforce
 23 the point, both plaintiffs have already filed for workers’ compensation benefits for some of the
 24 same injuries for which they have sought recovery in this lawsuit.

25 Workers’ compensation exclusivity can be avoided only by proof that the employer
 26 deliberately intended to cause the harm alleged. Undisputed facts demonstrate that no such intent
 27 exists here. Both Walker and Carreker testified that their clubs never *intentionally* sought to injure
 28 them. Indeed, the “return-to-play” motive alleged in this litigation is fundamentally incompatible

1 with an intent to deliberately harm the very employees who make the clubs successful, as
 2 numerous courts have held in similar cases involving professional athletes.

3 At bottom, Walker and Carreker seek compensation for injuries and disabilities that
 4 allegedly developed while working for their employers and while performing their jobs. But the
 5 workers' compensation system is already designed to provide just that, and to do so on an exclusive
 6 basis.

7 **ARGUMENT**

8 Summary judgment is appropriate where the pleadings, discovery, and affidavits show that
 9 there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a
 10 matter of law.” FED. R. CIV. P. 56(c). Here, summary judgment is warranted because the
 11 undisputed evidence and governing law establish that workers’ compensation provides the
 12 exclusive remedy for plaintiffs’ alleged injuries.

13 In this diversity action transferred from the District of Maryland, this Court applies
 14 Maryland choice-of-law principles. *See Newton v. Thomason*, 22 F.3d 1455, 1459 (9th Cir. 1994)
 15 (citing *Van Dusen v. Barrack*, 376 U.S. 612, 642 (1964)). Recognizing that common-law damages
 16 actions for workplace injuries “are now barred by virtually all workmen’s compensation statutes in
 17 this country,” Maryland law “will enforce a bar created by the exclusive remedy statute of any state
 18 in which the employer may be liable for workmen’s compensation benefits.” *Hauch v. Connor*,
 19 435 A.2d 1207, 1211-12 (Md. 1983); *see Banks v. Virginia Elec. & Power Co.*, 205 F.3d 1332 (4th
 20 Cir. 2000) (Table) (“Under Maryland choice-of-law principles,” a suit by an employee against an
 21 employer “will be barred pursuant to another jurisdiction’s workers’ compensation laws if the []
 22 employer could also be held liable for workers’ compensation benefits to the employee in the other
 23 jurisdiction.”); *see also* 14-144 Larson’s Workers’ Compensation Law § 144.01 (stating same
 24 general rule).

25 As demonstrated below, these claims are barred by the workers’ compensation laws of
 26 California (for Walker’s claim against the Chargers), Colorado (for Carreker’s claim against the
 27 Broncos), and Wisconsin (for Carreker’s claim against the Packers). Those three states—like all
 28 others—make workers’ compensation the exclusive remedy for virtually all job-related injuries,

1 including injuries caused by intentional torts. *See, e.g., Portnoy v. Veolia Transp. Servs., Inc.*, 489
 2 F. App'x 228, 228–29 (9th Cir. 2013) (affirming summary judgment on intentional tort claims
 3 “preempted by California’s workers’ compensation scheme”); *Bldg. & Constr. Trades Dep’t, AFL-*
 4 *CIO v. Rockwell Int’l Corp.*, 756 F. Supp. 492, 495 (D. Colo. 1991) (holding that employees’
 5 intentional misrepresentation and concealment claims were barred by the exclusivity provisions of
 6 Colorado’s Workmen’s Compensation Act), *aff’d*, 7 F.3d 1487 (10th Cir. 1993); *Ellis v. Rocky Mtn.*
 7 *Empire Sports, Inc.*, 602 P.2d 895, 896 (Colo. Ct. App. 1979) (professional football player’s claim
 8 alleging that his club “intentionally required him to engage in contact football drills before he had
 9 fully recovered from [his] off-season knee injury, and that this activity caused further injury to his
 10 knee” was barred by Colorado’s workers’ compensation exclusivity); *Jenson v. Emp’rs Mut. Cas.*
 11 *Co.*, 468 N.W.2d 1, 6 (Wis. 1991) (stating that occupational injuries caused by intentional conduct
 12 lie within the exclusive purview of the Wisconsin Worker’s Compensation Act).

13 **I. Workers’ Compensation Provides the Exclusive Remedy for the Workplace Injuries
 14 Alleged Here**

15 “[T]he basic operating principle[] [of workers’ compensation] is that,” in lieu of a common-
 16 law damages action, “an employee is automatically entitled to certain benefits” for injuries “arising
 17 out of and in the course of employment or an occupational disease.” 1-1 Larson’s Workers’
 18 Compensation Law § 1.01. The rationale for this rule is “the ‘presumed compensation bargain,’
 19 pursuant to which the employer assumes liability for industrial personal injury or death without
 20 regard to fault in exchange for limitations on the amount of that liability.” *Johnson v. CVS*
 21 *Pharmacy, Inc.*, No. C 10-03232 WHA, 2011 WL 4802952, at *6–7 (N.D. Cal. Oct. 11, 2011)
 22 (Alsup, J.) (quoting *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 708 (1994)). Thus, the laws in
 23 California, Colorado, and Wisconsin each provide that workers’ compensation shall be the
 24 exclusive no-fault remedy for employees’ claims against their employers for injuries incurred in the
 25 scope of their employment. CAL. LAB. CODE § 3602 (where act applies, “the right to recover
 26 compensation is . . . the sole and exclusive remedy of the employee or his or her dependents
 27 against the employer”); COLO. REV. STAT. §§ 8-41-102, -104 (abolishing “all causes of action,
 28 actions at law, suits in equity, proceedings, and statutory and common law rights and remedies”

1 against employer); WIS. STAT. §102.03(2) (where statutory requirements for compensation exist,
 2 “the right to the recovery of compensation . . . shall be the exclusive remedy against the
 3 employer”).¹

4 As the leading workers’ compensation treatise makes clear, these “exclusivity rules” sweep
 5 broadly, “reliev[ing] the employer not only of common-law tort liability, but also of statutory
 6 liability under virtually all state statutes, as well as of liability in contract and in admiralty, for an
 7 injury covered by the compensation act.” 9-100 Larson’s Workers’ Compensation Law § 100.03;
 8 *see, e.g., Melendrez v. Ameron Int’l Corp.*, 240 Cal. App. 4th 632, 644 (2015) (California’s act
 9 “requires that we liberally construe the [laws] ‘in favor of awarding work[ers’] compensation, not
 10 in permitting civil litigation.’”) (citing CAL. LAB. CODE § 3202) (alteration in original); *Travelers*
 11 *Ins. Co. v. Savio*, 706 P.2d 1258, 1264 (Colo. 1985) (the “broad language” of the Act “articulates a
 12 legislative decision to establish exclusive as well as comprehensive remedies for injuries that are
 13 covered by the Act”); *Cty. of Dane v. Labor & Indus. Review Comm’n*, 759 N.W.2d 571, 582 (Wis.
 14 2009) (“the statute must be broadly construed in order to best promote its statutory purposes,”
 15 including preventing “the delays that might arise from protracted litigation”).

16

17

18 ¹ Even if Walker and Carreker could file claims in states other than where they practiced
 19 and played for the remaining defendants, it would make no difference, as suits against employers
 20 for workplace injuries “are now barred by virtually all workmen’s compensation statutes in this
 21 country.” *Hauch*, 453 A.2d at 1211; *see Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590–91
 22 (9th Cir. 2012) (conflict-of-law “problem only arises if differences in state law are material, that is,
 23 if they make a difference in this litigation”); *see, e.g., Segui v. CSC Sugar LLC*, Civ. A. No. 15-951,
 24 2015 WL 4713699, at *2 (E.D. Pa. Aug. 7, 2015) (finding choice-of-law analysis between
 25 Pennsylvania and New Jersey “unnecessary” because “both states’ workers’ compensation laws bar
 26 this action”). All twenty-two jurisdictions in which the NFL clubs play games have exclusivity
 27 provisions requiring employers to accept no-fault liability for on-the-job injuries. *See* ARIZ. REV.
 28 STAT. ANN. § 23-1022 (“The right to recover compensation pursuant to this chapter for injuries
 sustained by an employee or for the death of an employee is the exclusive remedy against the
 employer or any co-employee acting in the scope of his employment”); FLA. STAT. § 440.11; GA.
 CODE ANN. § 34-9-11; 820 ILL. COMP. STAT. 305/5, 820 ILL. COMP. STAT. 305/11; IND. CODE § 22-
 3-2-6; LA. REV. STAT. ANN. § 23:1032; MASS GEN. LAWS ch. 152, § 24; MD. CODE ANN., LAB. &
 EMPL. § 9-509; MICH. COMP. LAWS § 418.131; MINN. STAT. § 176.031; MO. REV. STAT. § 287.120;
 N.C. GEN. STAT. § 97-3, 97-10.1; N.J. STAT. ANN. § 34:15-8; N.Y. WORKERS’ COMP. LAW § 29(6);
 OHIO REV. CODE ANN. §4123.74; 77 PA. CONS. STAT. § 481; TENN. CODE. ANN. § 50-6-108(a);
 TEX. LAB. CODE ANN. § 408.001; WASH. REV. CODE § 51.32.010.

1 “[P]rofessional athletes,” including NFL players, receive “the same protection under
 2 compensation law as is enjoyed by everyone else who works for a living.” 2-22 Larson’s Workers’
 3 Compensation Law § 22.04. Indeed, numerous courts have held barred, due to workers’
 4 compensation exclusivity, state-law tort claims by NFL players and other professional athletes of
 5 the same kind alleged here. For instance:

- 6 • In *Breland v. Arena Football One, LLC*, No. 15-cv-2258, 2017 WL 1954240, at
 *2 (E.D. La. May 11, 2017), a professional arena football player’s
 7 misrepresentation and fraud claims alleging that the Arena Football League
 “knew of the potential risks associated with [the alleged injury] but intentionally
 concealed them” and “fostered an environment of brutality and violence and
 8 ignored the wellbeing of its players for the sake of profit” were barred by the
 exclusivity provision of Louisiana’s Act;
- 9 • In *Ellis v. Rocky Mountain Empire Sports, Inc.*, 602 P.2d 895, 896, 898 (Colo.
 Ct. App. 1979), a professional football player’s intentional tort claims alleging
 10 that his club “intentionally required him to engage in contact football drills
 before he had fully recovered from [his] off-season knee injury, and that this
 11 activity caused further injury to his knee” were barred by the exclusivity
 provision of Colorado’s Act;
- 12 • In *Gambrell v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163, 164,
 13 168 (Mo. Ct. App. 1978), a professional football player’s fraud and deceit
 14 claims alleging that his club “false[ly]” “represented to plaintiff that his physical
 condition was good and that he was fit to play” when in fact he “was disabled as
 15 a result of prior injuries,” and that he suffered injuries that “either would not
 have occurred . . . or were much more severe in extent than he would have
 16 received had he been physically fit to play football,” were “squarely” barred by
 17 the exclusivity provision of Missouri’s Act;
- 18 • In *Rivers v. New York Jets*, 460 F. Supp. 1233, 1238 (E.D. Mo. 1978), a
 19 professional football player’s claims alleging that the club was “wrongfully
 concealing from [him] the true nature of his physical condition and injury” were
 20 barred by the exclusivity provision of New Jersey’s Act;
- 21 • In *Bayless v. Philadelphia Nat’l League Club*, 472 F. Supp. 625, 627, 630 (E.D.
 22 Pa. 1979), *aff’d*, 615 F.2d 1352 (3d Cir. 1980), a professional baseball player’s
 23 claims that his illness resulted from his club’s “failure . . . to provide proper
 medical care in the administration of drugs” were barred by the exclusivity
 24 provision of Pennsylvania’s Act;
- 25 • In *Martin v. Casagrande*, 159 A.D.2d 26, 30 (N.Y. App. Div. 1990), a
 professional hockey player’s claims for intentional concealment and fraud
 regarding a knee injury suffered while playing were barred by the exclusivity
 26 provision of New York’s Act; and
- 27 • In *DePiano v. Montreal Baseball Club, Ltd.*, 663 F. Supp. 116, 117-18 (W.D.
 Pa. 1987), *aff’d*, 838 F.2d 1205 (3d Cir. 1988), a professional baseball player’s
 28 claims that his club “insisted on keeping [him] in the lineup despite his injury”
 were barred by the exclusivity provision of New York’s Act.

1 Plaintiffs' claims here are no different. Walker alleges that, in 2014, he returned to play
 2 after spraining his left ankle; that a Chargers' team doctor gave him Toradol injections before and
 3 during games; and that, as a result, he now "experiences pain in his ankles." Second Amended
 4 Complaint ("SAC") (Dkt. No. 189) ¶¶ 246, 272. Carreker alleges that, while playing for the
 5 Broncos and the Packers, he "regularly consumed enormous quantities of painkilling anti-
 6 inflammatory drugs and muscle relaxers" provided by club athletic trainers, and that anti-
 7 inflammatory drugs proved "ineffective" in treating a 2012 heart infection because of "the
 8 resistance he had built up to such drugs . . . *during his playing career.*" SAC ¶¶ 255, 257
 9 (emphasis added). Both plaintiffs' allegations plainly pertain to acts that arose in the course of
 10 their employment with their clubs.

11 Plaintiffs cannot avoid the workers' compensation bar by asserting that their injuries did not
 12 manifest until after their playing careers. Workers' compensation covers injuries incurred during
 13 the course and scope of employment regardless of whether they first manifest themselves in or out
 14 of the workplace. *E.g., Lazo v. Mobil Oil Ref. Corp.*, No. CV 14-1072 ABC (JCX), 2014 WL
 15 12596483, at *2-3 (C.D. Cal. Mar. 17, 2014) (noting that "[n]umerous California cases indicate that
 16 diseases that manifest after employment are subject to workers' compensation," "which provides
 17 the exclusive remedy for [p]laintiffs' injury"); *Aetna Cas. & Sur. Co. v. Indus. Comm'n*, 474 P.2d
 18 242, 242-43 (Colo. Ct. App. 1970) (holding Colorado Act covered employee's tenosynovitis—
 19 even though she did not discover it until she had surgery two years after the
 20 incident—because "she was injured in an accident arising out of and in the course of her
 21 employment"); *Boyer v. Weyerhaeuser Co.*, 39 F. Supp. 3d 1036, 1043 (W.D. Wis. 2014)
 22 (exclusivity rule barred former employee's tort claims although asbestos-related injuries did not
 23 develop until after employment).

24 Workers' compensation also covers, and the exclusivity bar therefore extends to, claims
 25 asserting occupational diseases and aggravation or increase of a previously sustained injury. *E.g.,*
 26 CAL. LAB. CODE § 5500.5 ("[o]ccupational disease or cumulative injury" are encompassed within
 27 the workers' compensation system); *id.* § 3600.5 (special cumulative injury provision for
 28 professional athletes); COLO. REV. STAT. § 8-41-301(c) (providing coverage when "injury or death

1 is proximately caused by an injury or occupational disease arising out of and in the course of the
 2 employee's employment"); *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. Ct. App. 1990)
 3 (holding employer liable under workers' compensation for medical expenses associated with
 4 aggravation of employee's existing cancer caused by work-related injury); WIS. STAT. § 102.03
 5 (providing coverage for injuries sustained when "the employee is performing service growing out
 6 of and incidental to his or her employment" or "the accident or disease causing injury arises out of
 7 the employee's employment").

8 Similarly, injuries caused or exacerbated by medical care provided in the course of
 9 employment are covered injuries for purposes of workers' compensation exclusivity. *See, e.g.*, 1-
 10 Larson's Workers' Compensation Law § 10.09 ("[i]t is now uniformly held that aggravation of
 11 the primary injury by medical or surgical treatment is compensable"); *Jenkins v. Sabourin*, 311
 12 N.W.2d 600, 604 (Wis. 1981) ("injury [to employee] in the course of [medical attention to a
 13 covered industrial injury] subjects the employer only to [workers'] compensation liability and not
 14 to damages in tort"); *Nation v. Certainteed Corp.*, 84 Cal. App. 3d 813, 815-16 (1978) (workers'
 15 compensation exclusivity barred tort action against employer alleging that industrial injury was
 16 aggravated by negligence of physician to whom the plaintiff was referred by employer for
 17 treatment).

18 Plaintiffs cannot dispute that they could bring workers' compensation claims for their
 19 alleged injuries. Both have already done so. Walker filed a workers' compensation claim in
 20 California against the Chargers in June 2016, which is currently pending. *See* Nash Decl. Ex. 1 at
 21 14:8-17, 244:13-19; Ex. 2. He admitted that the injuries for which he seeks compensation in his
 22 workers' compensation case are among the injuries for which he seeks damages in this case. Nash
 23 Decl. Ex. 1 at 243:8-248:23. Carreker filed workers' compensation claims in both Colorado and
 24 California against the Broncos. *See* Nash Decl. Ex. 3 at 287:1-8, 292:20-301:10; Exs. 4, 5.
 25 Although he has not yet sought workers' compensation benefits relating to his alleged resistance to
 26 anti-inflammatory medication—the only non-time-barred claim he asserts—his prior claim alleged
 27 injuries to nearly every part of his body, including his head, neck, back, spine, upper and lower
 28 extremities, and internal injuries. Nash Decl. Ex. 3 at 298:13-301:10; Ex. 5.

1 In short, as in the numerous cases cited above, plaintiffs' tort claims are barred by
 2 applicable workers' compensation laws.

3 **II. Undisputed Facts Establish That No Exception to Workers' Compensation Exclusivity**
 4 **Applies Here**

5 Given the clear application of the workers' compensation laws to plaintiffs' alleged
 6 workplace injuries, plaintiffs bear the burden of demonstrating that their claims fall "within a
 7 recognized exception" to the exclusive remedy provisions of the relevant workers' compensation
 8 laws. *Flowmaster, Inc. v. Superior Court*, 16 Cal. App. 4th 1019, 1025 (1993); *see, e.g., Behrens v.*
 9 *Fayette Mfg. Co.*, 4 Cal. App. 4th 1567, 1574 (1992), *modified* (Apr. 16, 1992) ("Plaintiff, seeking
 10 to be excluded from the general sweep of the exclusive remedy of workers' compensation, must
 11 establish that the exception applies."); *Digliani v. City of Fort Collins*, 873 P.2d 4, 7 (Colo. Ct. App.
 12 1993) (holding plaintiffs must show more than "merely alleging" exceptions to workers'
 13 compensation benefits "in order to pursue common law remedies"); *West Bend Mut. Ins. Co. v.*
 14 *Berger*, 531 N.W.2d 636, 639 (Wis. Ct. App. 1995) (holding claimant "must show" exceptions to
 15 the exclusive remedies rule, which are to be "narrowly construed"). Plaintiffs cannot meet that
 16 burden.

17 **A. Workers' compensation exclusivity applies unless the employer deliberately
 18 intended to injure the plaintiff.**

19 Essentially all workplace injuries—even those resulting from an employer's "serious and
 20 willful misconduct," CAL. LAB. CODE § 4553—are encompassed within workers' compensation
 21 exclusivity. There is no general "intentional tort exception" to workers' compensation exclusivity.
 22 *E.g., Stalnaker v. Boeing Co.*, 186 Cal. App. 3d 1291, 1299-1300 (1986) (rejecting plaintiff's
 23 argument that any misconduct of an employer which may be characterized as "intentional" is
 24 excluded from workers' compensation exclusivity); *Ellis*, 602 P.2d at 898 ("the basic principles"
 25 governing workers' compensation exclusivity "are not changed" simply because a plaintiff alleges
 26 an intentional tort); *Digliani*, 873 P.2d at 7 ("allowing claimants to avoid the statute's exclusive
 27 remedy provision by merely alleging intentional torts by an employer . . . would be repugnant to
 28 the [Colorado] Act"); *Jenson v. Emp'rs Mut. Cas. Co.*, 468 N.W.2d at 6 (claims arising from

1 occupational injuries caused by intentional conduct may be barred by workers' compensation
 2 exclusivity). As the leading treatise explains:

3 Since the legal justification for the common-law action is the nonaccidental
 4 character of the injury from the defendant employer's standpoint, the common-law
 5 liability of the employer cannot, under the almost unanimous rule, be stretched to
 6 include accidental injuries caused by the gross, wanton, willful, deliberate,
 7 intentional, reckless, culpable, or malicious negligence, breach of statute, or other
 8 misconduct of the employer *short of a conscious and deliberate intent directed to
 9 the purpose of inflicting an injury.*

10 9-103 Larson's Workers' Compensation Law § 103.03 (emphasis added).

11 In California, where Walker played for the Chargers, even injuries caused by an employer's
 12 "serious and willful misconduct" are explicitly governed by workers' compensation exclusivity.
 13 CAL. LAB. CODE § 4553. To fall outside the exclusivity ambit, the plaintiff must "allege[] and
 14 prove[] that the employer acted deliberately *with the specific intent to injure the employee.*"
 15 *Arendell v. Auto Parts Club, Inc.*, 29 Cal. App. 4th 1261, 1265 (1994) (internal quotation marks
 16 omitted, emphasis added); *see also Gunnell v. Metrocolor Labs., Inc.*, 92 Cal. App. 4th 710, 722
 17 (2001) (finding the Act remained the exclusive employee remedy "notwithstanding an employer's
 18 knowing failure to assure that the workplace is safe or the employer's fraud, deceit, or concealment
 19 of a dangerous condition") (internal citations omitted).

20 In Colorado, where Carreker played for the Broncos, the only workplace injuries that fall
 21 outside the state workers' compensation regime are those where the employer "deliberately
 22 intended to cause the injury." *Schwindt v. Hershey Foods Corp.*, 81 P.3d 1144, 1147 (Colo. Ct.
 23 App. 2003); *Ellis*, 602 P.2d at 898 (Colorado Act provided exclusive remedy for professional
 24 football player's intentional tort claims). Even an allegation that the employer knew that its
 25 conduct was "substantially certain" to cause injury or death, which plaintiffs do not allege here, is
 26 insufficient to avoid the exclusivity bar. *Schwindt*, 81 P.2d at 1146. As the courts in Colorado have
 27 explained, allowing an exception to exclusivity for anything less than a deliberate intention to harm
 28 has a great "potential for abuse" and "once a breach is made in that dam to accommodate an
 appealing case, it will be very difficult for the courts to know where to draw the line." *Id.* (quoting
 9-103 Larson's Workers' Compensation Law § 103.04).

1 Wisconsin's Worker's Compensation Act is just as expansive. The courts there have
 2 explicitly rejected a general exception for "intentional torts." *See Beck v. Hamann*, 56 N.W.2d
 3 837, 838, 840 (Wis. 1953) (Wisconsin Act was exclusive remedy for plaintiff who alleged that
 4 employer acted "deliberately, wantonly, wilfully, intentionally, in impotent anger, and in utter,
 5 reckless and wanton disregard of the consequences"); *see also Jenson v. Emp'rs Mut. Cas. Co.*, 468
 6 N.W.2d at 5 (affirming summary judgment for employer and rejecting employee's claim that
 7 "injuries that are caused by intentional conduct" are not subject to workers' compensation
 8 exclusivity). The only recognized exception relating to intentional conduct applies where, unlike
 9 here, an employee brings a suit against a *co-employee* for "an assault intended to cause bodily
 10 harm." *W. Bend Mut. Ins. Co. v. Berger*, 531 N.W.2d at 640; WIS. STAT. §102.03(2).²

11 Thus, the law in all three states at issue makes clear that proof that an employer knowingly
 12 or "willfully" permitted an unsafe workplace is insufficient to overcome exclusivity. *See, e.g.*,
 13 *Schwindt v. Hershey Foods Corp.*, 81 P.3d at 1146-47 (workers' compensation exclusivity barred
 14 personal injury action alleging that employer acted "in willful, wanton and reckless disregard for
 15 the health and safety" of employees). In fact, in these states, proof that an employer willfully and
 16 unlawfully violated a safety statute is insufficient to avoid the exclusivity bar. *See* 9-103 Larson's
 17 Workers' Compensation Law § 103.03 ("breach of statute" insufficient); *Vuillemainroy v. Am. Rock*
 18

19 ² Even if, contrary to their own sworn interrogatory responses as to which states' laws
 20 govern their claims (Nash Decl. Exs. 6, 7), plaintiffs were to argue that Maryland law governs their
 21 claims, they would still be barred. Maryland workers' compensation law specifically covers
 22 injuries "caused by a willful or negligent act of a third person directed against a covered employee
 23 in the course of the employment of the covered employee," MD. CODE ANN., LAB. & EMPL. §§ 9-
 24 101, -501, -509. The only exception is "[i]f a covered employee is injured or killed as the result of
 25 the deliberate intent of the employer to injure or kill the covered employee[.]" *Id.* § 9-509. "[A]n
 employer has acted with 'deliberate intention' . . . only where that employer had determined to
 injure an employee or employees within the same class and used some means to accomplish this
 goal." *Johnson v. Mountaire Farms of Delmarva, Inc.*, 503 A.2d 708, 714 (Md. 1986). It is not
 enough that the employer's conduct was willful, wanton, reckless, or even when "that conduct is
 undertaken with a knowledge and appreciation of a high risk to another." *Gantt v. Sec., USA, Inc.*,
 356 F.3d 547, 555 (4th Cir. 2004). Indeed,

26 [e]ven if the alleged conduct goes beyond aggravated negligence, and includes such
 27 elements as knowingly permitting a hazardous work condition to exist, knowingly ordering
 claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to
 work, or even wilfully and unlawfully violating a safety statute, this still falls short of the
 kind of actual intention to injure that robs the injury of accidental character.
 28 *Johnson*, 503 A.2d at 712 (quoting 2A A. Larson, *supra*, § 68.13, at 13-22 to 26 (emphasis
 omitted)).

& Asphalt, 70 Cal. App. 4th 1280, 1285 (1999) (“It is an expected part of the compensation bargain that industrial injury will result from an employer’s violation of health and safety, environmental and similar regulations.”); *Rodriquez v. Nurseries, Inc.*, 815 P.2d 1006, 1008 (Colo. Ct. App. 1991) (violation of safety statute does not provide an exception to the Workers’ Compensation Act); *Saxhaug v. Forsyth Leather Co.*, 31 N.W.2d 589, 592 (Wis. 1948) (holding “employer’s exclusive liability is for compensation under the Workmen’s Compensation Act,” despite violation of safe workplace statute). That is so “[e]ven if the employer . . . *deliberately* failed to correct known safety violations.” *Vuillemainroy*, 70 Cal. App. 4th at 1286 (emphasis added). Any broader interpretation would frustrate the goals of workers’ compensation and “open[] a Pandora’s box.”

*Id.*³

B. Undisputed facts establish that there was no intent to injure.

Plaintiffs do not allege that any of the defendant clubs intended to harm them. While they do allege some intentional conduct—including that the clubs “intended” to deceive them through their misrepresentations, SAC ¶ 307, and were aware of certain problems “associated” with the use of medications, *e.g.*, *id.* ¶¶ 309, 246—those allegations do not come close to alleging the deliberate *intent to injure* required to avoid exclusivity. By definition, the clubs could not have intended an

³ Although California courts previously have recognized that the state’s Workers’ Compensation Act does not preempt certain types of employer conduct that violate the public policy of the state, *see, e.g.*, *Ihama v. Bayer Corp.*, No. C 05-03483 WHA, 2005 WL 3096089, at *3 (N.D. Cal. Nov. 14, 2005) (Alsup, J.) (holding that California’s Workers’ Compensation Act did not bar negligent supervision claim arising out of alleged disability discrimination); *EEOC v. Interstate Hotels, LLC*, No. C 04-04092 WHA, 2005 WL 885604, at *3 (N.D. Cal. Apr. 14, 2005) (Alsup, J.) (holding that allegations of national origin discrimination under Title VII and the California Fair Employment and Housing Act were not preempted by the Workers’ Compensation Act), the California Supreme Court clarified in 2008 that the “public policy” exception to workers’ compensation exclusivity applies *only* to claims of wrongful termination known as *Tamency* claims. *See Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876, 902-03 (2008) (“The exception for conduct that ‘contravenes fundamental public policy’ is aimed at permitting a *Tamency* action to proceed despite the workers’ compensation exclusive remedy rule.”). Following *Miklosy*, “the ‘fundamental public policy’ exception is of exceedingly limited import” and, in any event, has no application to the intentional misrepresentation claims here. *See Thomas v. Starz Entm’t LLC*, No. 2:15 CV 09239, 2016 WL 844799, at *8 (C.D. Cal. Feb. 29, 2016); *see also Nguyen v. Durham Sch. Servs. L.P.*, No. SACV 15-1243, 2016 WL 3436381, at *2 (C.D. Cal. June 16, 2016) (explaining that “the California Supreme Court [through *Miklosy*] has expressly limited [the] application [of the so-called ‘public policy’ exception] to ‘common law claims of wrongful termination in violation of public policy,’ also referred to as ‘*Tamency* claims.’”); *Ferrer v. Host Int’l, Inc.*, No. LACV 16-06798, 2017 WL 902848, at *5 (C.D. Cal. Mar. 7, 2017) (“*Miklosy* also defined narrowly the public policy exception to the worker’s compensation laws, limiting it to *Tamency* claims for wrongful termination in violation of public policy.”).

1 injury when even plaintiffs acknowledge that the exposure merely was “potentially dangerous” or
 2 had “possible” side effects. *Id.* ¶¶ 246, 255.

3 Furthermore, plaintiffs allege that “[t]he medications were provided to [them] for the *sole*
 4 *purpose* of enabling [them] to practice and play through pain.” SAC ¶ 246 (emphasis added).
 5 *See also* SAC ¶ 103 (“every Club . . . has a financial interest in returning players to the game as
 6 soon as possible”). Thus, the Second Amended Complaint itself establishes that plaintiffs do not
 7 and cannot contend that the clubs were intending to cause them injury. *See* 2-22 Larson’s Workers’
 8 Compensation Law § 22.04 n.10 (“The business of a professional football team is to play
 9 professional football, not injure its employees,” citing *Pro-Football, Inc. v. Uhlenhake*, 558 S.E.2d
 10 571, 576 (Va. Ct. App. 2002), *aff’d*, 574 S.E.2d 288 (Va. 2003)). Like the professional baseball
 11 player in *DePiano*, plaintiffs’ allegation that their clubs “insisted on keeping” them on the field
 12 “despite [their] injur[ies],” “disproves rather than supports” the application of any exception
 13 “because it establishes a motive for [the team’s] conduct other than an intention to injure
 14 plaintiff[s].” 663 F. Supp. at 117; *see also* *Martin v. Casagrande*, 159 A.D.2d at 30 (finding “no
 15 evidence that [Buffalo Sabres hockey team and medical staff] intended to harm” player given that
 16 “[i]t is highly unlikely that defendants would do anything to injure him intentionally or to diminish
 17 his trade value, which proved to be substantial”); *Bayless*, 472 F. Supp. at 627, 630 (professional
 18 baseball player’s claims that his illness resulted from his club’s “failure . . . to provide proper
 19 medical care in the administration of drugs” did not amount to a claim that the team intended to
 20 harm the player).

21 Walker and Carreker’s deposition testimony confirms that neither can dispute the
 22 application of the workers’ compensation exclusivity bar. Each has conceded that his club(s) did
 23 not harbor any intent to injure him. Walker admitted that the Chargers’ doctors and trainers were
 24 not “trying to do anything to hurt [him] at all” when they were treating him. Nash Decl. Ex. 1 at
 25 209:1-11. Likewise, Carreker repeatedly admitted that the Packers’ doctors and athletic trainers
 26 never intended to harm him when providing medications: “No. I don’t think they were trying to
 27 harm me, or they lied to me or any way.” Nash Decl. Ex. 3 at 144:13-24; 145:21-146:6; *see also id.*
 28 308:16-309:24 (same for Broncos doctors and trainers).

1 These admissions are case dispositive. *See, e.g., Bulis v. Di Lorenzo*, 142 A.D.2d 707, 708,
2 531 N.Y.S.2d 107, 108 (N.Y. App. Div. 1988) (relying on “plaintiff’s deposition testimony” to find
3 lack of evidence “that the defendant intended to harm” plaintiff, and noting that “plaintiff’s version
4 of what occurred” confirms that there was “no intent to harm anyone”); *Hildebrandt v. Whirlpool*
5 *Corp.*, 364 N.W.2d 394, 396-97 (Minn. 1985) (because exclusivity exception requires a “conscious
6 and deliberate intent to inflict injury,” plaintiffs’ admission that employer’s actions were motivated
7 “not by animosity but by its own financial advantage” “does not meet the narrow exception”)
8 (internal quotation marks omitted). Plaintiffs simply cannot prove that the clubs, doctors, and
9 trainers acted with a “deliberate intent to inflict an injury” when they have conceded—and the
10 undisputed facts establish—precisely the opposite.

CONCLUSION

12 For the foregoing reasons, plaintiffs' claims for intentional misrepresentation are barred by
13 workers' compensation exclusivity. Summary judgment is warranted in favor of the Chargers,
14 Broncos, and Packers.

16 | Date: June 8, 2017

Respectfully submitted,

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